G. The Netherlands

de Graaf, K.J.; Tolsma, Hanna

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X. COUNTRY / REGION REPORTS

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(1) Introduction

This country report deals with the developments in the Netherlands in 2016. Achieving international climate change mitigation goals is one of the topics that is high on the political agenda, not only because of the obligations that were agreed upon in the Paris Agreement in December 2015 but also because the Netherlands was condemned by the district court of The Hague. The measures and activities of the Netherlands to reduce carbon dioxide emissions was deemed insufficient and unlawful in light of the duty of care. In this so-called *Urgenda* decision, which was discussed in last year's report, the court ordered the state to reduce greenhouse gas emissions by at least 25 percent compared to the year 1990 by 2020. After briefly discussing the relevant progress the Netherlands has made in its efforts to restructure environmental law (section 2), this report covers one of the measures considered to implement the *Urgenda* judgment: closing all Dutch coal-fired power plants (section 3). Another option to secure the reduction of greenhouse gas emissions is to set targets in a dedicated Climate Act. Parliament is discussing a legislative proposal for such a Climate Act (section 4). The Netherlands is (also) lagging behind compared to other European Union (EU) member states when it concerns achieving the renewable energy targets. There has been discussion in the Netherlands as to whether this situation has to do with the main instrument used to stimulate sustainable energy production (section 5). This country report ends with a section dealing with an important case about the lawfulness of the programmatic approach to nitrogen deposition and concerns nature protection law in the Netherlands (section 6).

(2) Legislative Reform and the New Nature Conservation Act (NCA)

The Dutch government is working on a legislative reform that will fundamentally change the structure of Dutch environmental law: the Environment and Planning Act (EPA). In 2016, the EPA was published in the *Official Government Gazette* (2016/156), and the government has worked tirelessly on all the necessary implementing legislation and delegated and implementing acts that need to be adopted before the EPA can enter into force, which is anticipated in 2019. The idea of this enormous legislative project is to restructure environmental legislation in such a way that it will be simpler to work with (one act and four delegated acts instead of twenty-six acts and 150 delegated acts) and will

also be better suited for the environmental goals the Netherlands wants to achieve (exploitation and protection of the environment with a view to sustainable development). In early 2017, the government was working to improve all four delegated acts that were discussed in 2016 and to organize consultations for supplementary acts that amend the EPA and enlarge its scope.

The Dutch legislators' desire to have one integrated act for environmental law is also relevant for nature conservation law. On 15 December 2015, a new NCA (Wet Natuurbescherming) was adopted. The NCA is meant to (re-)implement the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention) and the Convention on the Conservation of Migratory Species of Wild Animals (CMS). These international treaties are implemented in the EU by EEC Directive 92/43 on the Conservation of Natural Habitats and of Wild Fauna and Flora (Habitats Directive) and EU Directive 2009/147 on the Conservation of Wild Birds, which were transposed in the Dutch legal order by the NCA 1998 (*Natuurbeschermingswet 1998*), which is predominantly relevant for area protection, and the Flora and Fauna Act (*Flora en faunawet*), which is primarily concerned with species protection. The new NCA came into force on 1 January 2017 and replaces both the *Natuurbeschermingswet 1998* and the *Flora en faunawet* as well as the Dutch Forest Act.

The NCA regulates both species protection and area protection. It also regulates the trade and possession of plants and animals and the hunting of animals. All species of wild birds occurring naturally in the Netherlands and all animal species listed in Annex IV(a) of the Habitats Directive, in Annex II of the Bern Convention, and in Annex I of the CMS are protected by the new NCA. The annexes of the Bern Convention and the CMS are explicitly mentioned in the NCA (Article 3.5 of the NCA). This provision prohibits not just the deliberate killing and catching of these animals but also the deliberate disturbance of the animals and the deliberate destruction of, or damage to, their nests and eggs or removal of their nests. The legislation is closely aligned with EU legislation and is meant to be a comprehensive implementation of all relevant nature conservation and protection law in the Netherlands. All competences to either grant individual derogations or general exemptions have been transferred to the regional (provincial) level. The same is true for the obligation to actively stimulate ecological improvements in protected areas and the protection of species. This means that the provinces in the Netherlands are the primary government tier to deal with the goals and challenges of nature protection in the Netherlands and the factual implementation of international law concerned with nature protection.

One could think that the introduction of the new NCA on 1 January 2017 is the end of a long process of redeveloping nature conservation and nature protection legislation in the Netherlands and that no new legislation is to be expected. However, this is not the case. The legislator has already announced that the NCA will be revoked in the future and will be merged with, and replaced by,

the EPA at the moment the EPA enters into force. The latest development is, therefore, that the government has published a consultation version of a supplementary act to the EPA in order to integrate the entire NCA in the EPA. The structural reform of environmental law will, therefore, also include nature conservation legislation. As a consequence of the introduction of nature protection in the EPA, many substantive elements of nature protection regulation will be laid down in a delegated act to the EPA and not in the EPA itself.

(3) Closing All Coal-Fired Power Plants

One of the measures considered by the government to achieve its climate change mitigation goals is closing the remaining five coal-fired power plants in the Netherlands. In 2016, there were still seven plants in operation (three of them became fully operational only in 2015 and 2016). Two, however, are expected to close in the summer of 2017 when new energy efficiency standards will come into effect. Closing all coal-fired power plants would reduce emissions of carbon dioxide in the Netherlands by 11 percent within a short period. In 2015, the House of Representatives adopted a motion that requests government to come up with a plan to phase out all coal-fired power plants (Parliamentary Papers II 2015/16, 34302, no. 99). Another motion was adopted in September 2016 requesting that the government ensure that the time path for closing the plants is in line with the Paris Agreement and to reduce carbon dioxide emissions by 25 percent in 2020 and 55 percent in 2030 compared to 1990 (Parliamentary Papers II 2016/17, 34550, no. 14).

In January 2017, the government presented the results of the research that had been conducted in order to gain insight into the effects of closing all coal-fired power plants (Parliamentary Papers II 2016/17, 30196, no. 505). One of the main conclusions is that measures on the level of member states of the EU are not effective when compared to a European approach. Closing the power plants will indeed reduce the emissions of carbon dioxide in the Netherlands. However, leakage effects of carbon dioxide emissions will occur in other countries. To meet the electricity demands in the Netherlands, plants in other countries, such as Germany, will take over the production of electricity, and, therefore, the emissions of carbon dioxide will increase. Also, plants in the Netherlands are relatively clean and effective compared to some other, older power plants in Europe. The leakage effect of carbon dioxide emissions could be prevented if, coordinated at the European level, the most polluting plants would close first, and cleaner and more efficient plants would take over energy production. The government has also discussed a list with legal measures that would actually cause the five plants to close. Most of the listed measures turned out not to be (legally) feasible, effective, or efficient. Examples are the withdrawal of the permits, introducing a carbon dioxide standard for electricity produced by coal-fired plants or an obligation to capture the carbon dioxide and store it

underground or at sea (carbon capture and storage). Other measures were assessed as being more positive, such as stricter efficiency requirements and a ban on the production of electricity with coal.

However, at present, the government does not have any reason to take immediate action to close all coal-fired power plants. According to the government, the Netherlands is on schedule to achieve the goals set in the 2013 Dutch Energy Agreement for Sustainable Growth. The annual progress report shows that these goals are within reach (Parliamentary Papers II 2016/17, 30196, no. 503). It is expected that the reduction of carbon dioxide emissions is going to increase to 25 percent or more by 2020. This also means that implementation of the *Urgenda* decision by the state could be guaranteed. Additional measures to reduce carbon dioxide emissions, such as closing coal-fired power plants, are only considered when future annual reports would show that the goals could no longer be achieved.

(4) Proposal for a Dutch Climate Act

One of the possible ways to achieve carbon dioxide emissions reduction goals is to explicitly stipulate the goals in binding legislation. At present, there is no legislation in the Netherlands with such enforceable climate targets. However, the *Urgenda* decision and the binding obligations of the Paris Agreement raised the question of how to set binding carbon dioxide emissions reduction targets in legislation. On 12 September, a legislative proposal for a Climate Change Act was submitted to the House of Representatives (Parliamentary Papers 2015/16, 34534, no. 2). Many countries, such as the United Kingdom, Finland, and Denmark, have already embedded emission targets in a Climate Change Act. Sweden is working on such an act, and, in the Netherlands, a first draft for a Climate Act appeared in 2008. This first draft was written by a coalition of thirty civil society organizations that were of the opinion that the Dutch climate change mitigation policy was too soft. They believed that there ought to be consequences if emission reduction goals are not met. In 2008, however, there was no political majority to support this initiative. In 2016 two members of the House of Representatives (Jesse Klaver and Diederik Samsom) took the initiative for a Climate Act and proposed a legal framework for introducing policies that aims at the irreversible and gradual reduction of Dutch greenhouse gas emissions in order to limit global warming and mitigate climate change. The revised version of the legislative proposal on climate mitigation meets the approval of five political parties (Parliamentary Papers 2016/17, 34534, no. 6).

What goals have been stipulated in the proposed act? Article 3 of the proposed Climate Act determines that greenhouse gas emissions must be reduced by at least 95 percent, compared to 1990, by 2050. Therefore, the greenhouse gas emissions reduction in 2030 is set at 55 percent compared to 1990. The renewable energy share in 2050 is 100 percent. Also noteworthy is that these goals are

more ambitious then the European goals (40 percent emissions reduction in 2030). The reason given is that research shows that the worldwide intentions to reduce emissions are insufficient to reach the obligation of the Paris Agreement. In order to achieve these goals, the proposed Climate Act contains a legal framework with a few instruments. It is clear that the Climate Act consists of similar elements that can be found in the climate acts of other countries mentioned above. The main instrument is the so-called Climate Plan (Articles 4–6) that contains key issues of the governmental climate policy aimed at achieving the targets for the first five years. Second, the government is obliged to adopt a climate budget each year with coherent targets for emissions reduction, energy savings, and the increase of renewable energy production/consumption (Articles 7–8). Furthermore, the government has to prepare a climate report annually (Articles 9–10). If the report shows that annual goals are not met, the government has to explain what measures will be taken in order to achieve the goals. The Climate Act also provides for the introduction of a Climate Committee (Articles 12–13). The task of this committee is to provide the minister with advice on the implementation of the Climate Act. The planning agency for the environment is obliged to provide the minister with all scientific reports on climate change and reduction of greenhouse gas emissions (Articles 14–15).

In March 2017, elections were held in the Netherlands. The initiative for introducing a Climate Act is considered a 'controversial topic.' This means that during the period needed to construct a new government, the legislative process concerning the Climate Act is on hold. In May 2017, a large group of Dutch entrepreneurs emphasized the importance of a clear climate policy and pleaded for binding long-term targets in a Climate Act. It has become clear that the legislative proposal for a Climate Act is an important issue in the political process of shaping a new government.

(5) Stimulation of Sustainable Energy Production

At the moment, only 5.5 percent of the energy produced in the Netherlands is generated by renewable sources. By 2020, the target of 14 percent renewable energy production has to be reached. This obligation follows from EC Directive 2009/28 on the Promotion on the Use of Energy from Renewable Sources. However, in the EU, the Netherlands is not performing well in terms of renewable energy. Scholars point out that the results of the main instrument stimulating renewable energy production is rather disappointing. It concerns an operating grant called *Stimulering Duurzame Energieproductie* (Encouraging Sustainable Energy Production; SDE+). The aim of this grant is to compensate producers for the so-called unprofitable component: the difference in price between the cost price of renewable energy and the market price. Research shows that in practice there are some problems with SDE + (PFM Dijkshoorn, TJW Quispel, and PJD Jacobs, 'De SDE+, een grote plus voor groen energiebeleid?'

Milieu en Recht 16 (2017)). Entrepreneurs suffer from the many policy changes that require changing business operations. Financiers are reluctant to provide loans for project development. The requirement that certain (costly) permits need to be authorized in advance in order to get the grant has some disadvantages, specifically for small entrepreneurs. These scholars recommend that renewable energy should be given priority on the electricity and gas net (just like in Germany). Introducing an obligation to buy renewable energy at a fixed price would stimulate financiers to invest and would also discourage the use of fossil fuels for energy production. However, it is not likely that these recommendations will change the current legal framework for the SDE+. According to the government, a recent evaluation of the functioning of SDE+ shows that the instrument is efficient and effective and generally works well (Parliamentary Papers II 2016/17, 31239, no. 249). Also, the 2013 annual report on the progress of the Energy Agreement for Sustainable Growth concludes that with the help of some already announced additional measures the goal of 14 percent renewable energy production/consumption is expected to be reached (Parliamentary Papers II 2016/17, 30196, no. 503).

(6) Lawfulness of the Programmatic Approach to Nitrogen Deposition

One of the interesting aspects of the new NCA that we briefly discussed in section 2 is that it introduces a generic basis for applying a programmatic approach for the protection and conservation of nature. The Netherlands has introduced the legal instrument of a 'programmatic approach' in several environmental policy areas to achieve environmental targets and, at the same time, create possibilities for economic development in areas where environmental standards will not facilitate such development. In the previously applicable NCA 1998 (*Natuurbeschermingswet 1998*), the Netherlands introduced in 2015 a specific form of a programmatic approach. The so-called Programmatic Approach to Nitrogen (Programmatische Aanpak Stikstof; PAS) aims to achieve nature protection goals through a coherent program. The PAS regulates the effects of nitrogen deposits on Natura 2000 areas, which are the areas specifically protected by the European Commission Habitats Directive. Governments at both the national and provincial levels have joined forces to cope with the problem of nitrogen deposition in the Netherlands. They have developed a coherent programmatic approach that aims to reduce nitrogen deposition using both measures at the source of the deposition and measures for specific protected areas. The PAS aims for both ecological improvement and space to allow economic developments. To that end, it provides a permitting system for activities that cause nitrogen deposition in Natura 2000 areas. Such permits are required for developments in the livestock sector, but also for new residential areas, the construction of roads, and the expansion of industrial activities. The PAS, however, also stipulates what activities no longer require a permit. The government

anticipates that such a programmatic approach could also be used for other goals in nature conservation. Therefore, the new NCA (art 1.13 of the NCA) contains a broad framework that provides a general basis for implementing a programmatic approach. It also stipulates monitoring obligations once a program is adopted, either by the national government or at the regional level. The NCA also grants governmental bodies the competence to adopt programs that provide for a programmatic approach for other elements that hamper the realization of conservation objectives, such as a programmatic approach aimed at achieving or improving the (favourable) state of conservation of species.

Although a programmatic approach is considered an innovative legal instrument to achieve nature protection targets in a flexible way, the lawfulness of the specific programmatic approach to nitrogen deposition under the Habitats Directive was seriously questioned in 2016. In the beginning of 2017, the Administrative Jurisdiction Division of the Council of State was triggered by legal grounds brought forward in several appeal cases to ask the Court of Justice of the European Union (CJEU) for a preliminary ruling on the PAS. According to the court, the Dutch innovative approach could very well be lawful under the Habitats Directive (Article 6), but it could not derive sufficient certainty from the applicable EU law or case law of the CJEU for drawing that conclusion. Since the usefulness of the programmatic approach under the NCA—and, possibly, the EPA in the future—will at least partly depend on the CJEU's answers to the questions posed by the Dutch court, which we will briefly discuss the questions raised.

The questions referred to the CJEU for a preliminary ruling concern two kinds of cases. Until the questions are answered and the Dutch court has subsequently reached a final judgment, the (permitted) activities are deemed to be legal. The first kind of case concerns cattle farmers that were granted a permit to expand on the basis of the PAS. The main question is whether this programmatic approach may be used for granting permits under the Habitats Directive. The court has five questions concerning the conformity of Dutch law with EU legislation. Is it lawful under the Habitats Directive to exclude certain activities from the permitting system because they will cause nitrogen deposition below a certain threshold? A related question concerns the requirement to perform an appropriate assessment of the effects on the Natura 2000 area for individual plans or projects. The question here is whether the appropriate assessment for the entire PAS can be used as a basis for granting individual permits for individual projects. The third and fourth questions concern the elements that may be taken into account in the required appropriate assessment. May the positive effects of conservation measures be taken into account in the appropriate assessment of the PAS if these measures have not yet been implemented at the time of the assessment and if the positive effects of the measures have not yet been realized? And what about the positive effects of the anticipated autonomous decline of nitrogen deposition in a program period? The fifth question relates to the measures stipulated in the

program that anticipate a reduction in nitrogen deposition. Are these measures to be considered mitigating measures that can be taken into account in the appropriate assessment even if they have not yet been carried out at the time of the appropriate assessment and the anticipated reduction has not yet been realized? In answering all of these questions, the court also wants to know whether the existence of monitoring requirements and the competence to adjust the program could be relevant.

The second kind of case concerns both grazing cattle and spreading manure on the land. Under the right circumstances, a permit is no longer required for these activities. Several interested parties have, however, demanded enforcement action against such activities, claiming that it is unlawful to allow cattle to graze and to spread manure on the land without an appropriate assessment of the effects and a permit. Applications by the interested parties to apply administrative enforcement action were refused on the basis of the PAS. The Dutch court asked the CJEU whether these activities may be authorized in this manner under the Habitats Directive. The court formulated seven questions. The first three questions are all concerned with the interpretation of the term 'project' in Article 6(3) of the Habitats Directive. May an activity that does not qualify as a project as referred to in Article 1(2)(a) of EU Directive 2011/92 on the Assessment of the Effects of Certain Public and Private Projects on the Environment still be considered a project as referred to in Article 6(3) of the Habitats Directive because the activity may have a significant effect for a Natura 2000 area? If these activities are considered projects and were legal before the Habitats Directive was applicable to the relevant Natura 2000 area and are still taking place, may they be considered one and the same project even if the grazing or the spreading of manure has not always been carried out on the same parcels in the same quantities and with the same techniques? Yet another question concerns activities that are inextricably linked to a project. Should they therefore be considered as a project that needs an individual appropriate assessment of the effects on the Natura 2000 area? In addition, the Dutch court would like to know if legislation could effectively exclude a particular category of projects from the permit requirement and therefore allow these projects without individual permission when assuming that the consequences of those activities have been appropriately assessed before the legislation was implemented. Fourth, the court asks whether the appropriate assessment underlying the exception to the permit requirement for grazing cattle and spreading manure is in accordance with Article 6(3) of the Habitats Directive, specifically because the assessments have taken into account the PAS, which assumes a decrease of the total nitrogen deposition in the Natura 2000 areas. The fifth question of the Dutch court is whether an appropriate assessment for a program such as the Programmatic Approach to Nitrogen (for the years 2015–21) may take the positive effects of conservation measures for existing nature protection areas (Articles 6(1-2) of the Habitats Directive) into account—even if these measures

have not yet been implemented at the time of the appropriate assessment and the positive effect of this has not yet been realized? The court's next question concerns the anticipated autonomous decline of nitrogen deposition and its relation to the appropriate assessment of the effects thereof on the Natura 2000 areas. The seventh and last question is whether restorative measures that are included in a program such as the PAS that serve to prevent nitrogen deposition may qualify as mitigating measures that may be included in an appropriate assessment.

All in all, these questions are of a rather technical nature, and the Netherlands will have to wait for quite some time for an answer. The referring judgment of the Dutch Council of State explicitly states the desire to receive answers before 1 July 2018, but it is not certain whether the CJEU will grant this wish. The answers provided by the ECJ in the future will potentially have a huge impact on the efforts of the Dutch legislator for trying to introduce a new and flexible legal instrument to achieve the nature protection goals. The NCA will be replaced by the EPA, and the latter will introduce provisions allowing for a programmatic approach that is even more general in nature than the provisions in the NCA. The Netherlands may than have introduced an important and innovative legal instrument to achieve environmental goals and targets but must remain aware that the application of any legal instrument of Dutch environmental law must be in accordance with European and international environmental law.

Kars de Graaf and Hanna Tolsma
k.j.de.graaf@rug.nl
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